VIRGINIA LAW REGISTER

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The old problem of "What becomes of the pins?" becomes a mere child's question by that more important one "How do the lawyers make a living?" Especially when we take into consideration the number of lawyers in the United States and the relation of that number to the population.

Lawyers and Their Numbers.

According to the census of 1910 there is one lawyer to every 806 people in this Union. In Virginia one to every 1,140 people. North Carolina has amongst its other proud distinctions—such as the Mecklenburg Declarations, the first at Bethel, fartherest at Gettysburg and "modestest" of all Commonwealths—the distinction of having fewer lawyers to its population of any state in the Union: It has one in every 1,680 people. The District of Columbia has the largest proportion, one in every 218 people. South Carolina ranks next to North Carolina, having one in every 1,671 people. Nevada comes next to the District of Columbia, one in every 280 people. The Southern States have a less proportion of lawyers to population than any other section of the Union. Pennsylvania and Rhode Island resemble the Southern States in that the former has one lawyer in every 1,068 people and the latter one in every 1,169. New York has one in every 532 people. Massachusetts, one in every 768.

The question is, how do all of these lawyers manage to make a living? Many of them do not. Many of them are lawyers only in name; many combine other work with their professional work and the number of "farmer-lawyers," or "lawyer-farmers," we believe would be found—especially in the Southern States—to be unusually large.

But this large proportion—or disproportion—of lawyers in our population may explain in part the decadence in professional ethics so much complained of and so much to be deprecated. "One must live," and therefore the living must be had even

at the sacrifice of the higher things of life. We see no remedy, except Jack Cade's "Let's kill all the lawyers" (Hen. VI, Part II, Act IV, Scene 2), and that is a little too drastic.

And yet the law schools are crowded and each year shows a steady accretion in the ever increasing ranks. We will watch with much interest the figures in the census of 1920, if we live to see it taken, and we "have hopes."

There are 796 negro lawyers in the Union—59 in the District of Columbia, 58 in New York, 61 in Oklahoma—1 each in Delaware, Maine, Montana, Nevada, North Dakota, Utah and Wyoming. Virginia has 37, Massachusetts 27, Pennsylvania 26, Ohio 39, South Carolina 4. No list of female lawyers is given. It is surprising to note that 274 are given as practicing at ages ranging from 16 to 20. We are frank to say we do not understand how this can be. 67,713 are of ages ranging from 21 to 44 years and 46,159 are 45 and over.

These figures are interesting if not instructive, to say the least of it.

What Is Not a Home under the Prohibition Act.

The word "home" in the Prohibition Act is used in a different sense from its common acceptation. In determining the meaning of the word it is best to lose sight of its ordinary use. The act does not use "home" as a word having a previously settled, ordinary or legal meaning, but, in its definition, the word signifies a place where ardent spirits may be kept, used or given away. What is not a home is a place where ardent spirits may not be kept, used or given away. The general statement that a home "shall be the permanent residence of the person and his family" [1] clearly requires that a home must be a permanent residence of the person. Any place which is not a permanent residence or which is the residence of another is not a home. This is an implied exception from the general statement.

In addition to this implied exception there are a number of places expressly excepted from what shall be deemed a "home."

1. See 2 Va. Law Reg., N. S., 705.

These places are: a club [2] or club house,[3] fraternity house,[4] lodge [5] or lodge room or rooms,[6] meeting place,[7] house of prostitution,[8] pool or billiard rooms, bowling alley, store,[9] place of common resort or room of a guest in a hotel or boarding house.[10] It is further declared that any room, boat, car or any place in any building or in the open air, on land or water which is a meeting place, is not a home.[11]

A club or club house is both expressly and impliedly excluded from the definition of "home." It is impliedly excluded because it is not the permanent residence of the person. By club is evidently meant an association of individuals usually for pleasure, although it may also be for other purposes. It is generally for an indefinite existence and not a meeting for a particular occasion. A club may be incorporated or may be a voluntary association. The legislature has made no attempt to distinguish between permanent and bona fide clubs and temporary and law-evading institutions. The difficulty of determining what is a bona fide club, which has perplexed the legislature and the courts, is avoided by putting the two upon the same footing. It is unimportant whether the institution is open to the public or whether one may become a member by purchasing a ticket or signing a card or whether the organization is a bona fide club with limited membership into which admission can not be obtained by any person at his pleasure. No club of any description is a "home." [12]

By fraternity house is evidently meant the residence, and possibly the meeting place, of a fraternity of a college or university. The fraternity house, home or lodge of other fraternal organizations is commonly designated as a lodge, and the act apparently uses these terms in their ordinary acceptation. An Elk's "home" is never designated as a fraternity house. It is probably

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2. § 61.
3. § 16.
4. §§ 16, 61.
5. § 16.
6. § 61.
7. § 16.
8. § 17.
9. § 53.
10. § 61.
11. § 16.
12. As to what is a social club, see Hanger *v.* Com., 107 Va. 872, 60 S. E. 67, 68.

both a club and a lodge or lodge room. The building is commonly used for both purposes.[13]

Section 16 of the act uses the word "lodge" in connection with fraternity house and meeting place. In this connection the word necessarily means the meeting place of a fraternity or association.[14] In § 61 the act reads "lodge room or rooms." A lodge room may have either of two meanings, that given above or the room of a lodger in a house of another. In the latter sense the room is usually termed a lodging.[15] This latter definition is, however, inapplicable to the terms as used in § 61 for two reasons, (1) the terms are used in connection with club, fraternity house and place of common resort, which clearly shows that the legislature meant to use the words to designate the meeting place of a club or fraternity, and (2) this section is to be construed with reference to § 16, in which "lodge" is used in connection with club and fraternity house, with the unimportant omission of the words "room or rooms." These words are unimportant because every lodge must necessarily consist of a "room or rooms." The rule that a statute should be construed as a whole and its various parts harmonized has especial force in the construction of these two sections of the act. This means that the room of a lodger in the home of another or in an apartment house is not a lodge room, and, if it is the permanent residence of the person and his family if he has one, it is a "home," in which ardent spirits may be kept, given away or used. This construction is not in any sense strange but is in accord with the clearly expressed intention of the legislature.

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13. See Bradford *v.* Board of Education (Cal.), 121 Pac. 929.

14. Laycock *v.* State, 136 Ind. 217, 36 N. E. 137, 140.

15. Bailey *v.* People, 60 N. E 98, 100, 190 Ill. 28, 54 L. R. A. 838, 83 Am. St. Rep. 116.

"Lodging houses" is the term applied to houses containing furnished apartments which are let out by the week or by the month, without meals, or with breakfast simply. They are called by the French, "hotels," but not so by us. Cromwell *v.* Stephens (N. Y.), 2 Daly, 15, 25, 3 Abb. Prac. 26, 35. 5 Words and Phrases, 4227.

A lodger is one who inhabits a portion of a house of which another has the general possession and custody. Metzger *v.* Schabel, 52 N. Y. Supp. 105, 106, 23 Misc. Rep. 698 (citing 13 Am. & Eng. Law, 1003); McDowell *v.* Hyman, 48 Pac. 984, 986, 117 Cal. 67, 5 Words and Phrases, 4226.

Had the legislature had a lodging room in mind it would have excluded it by express mention.

Section 16 of the act refers to a "meeting place" and further declares that it may be a house, room, boat, car or any place in any building or in the open air, on land or water. These words are indicative of the place of meeting, but do not define what constitutes a meeting. A meeting place is evidently the fixed place of meeting at which a number of persons commingle for social, religious or other purposes involving any form of intercourse. By "meeting place," the legislature probably meant a "place of common resort," as used in § 61.

A building or place generally reputed in the neighborhood where the same is located to be a building or place where persons of opposite sex meet for the purpose of prostitution is a house of prostitution.[16]

A pool or billiard room is a room in which billiards or pool are played and that is open to the public with or without price. It is not a room in a club or private home, used only by the members or the owner and his friends. The act does not use pool room in the sense of a room in which bets are taken or arranged.

A store is a public place, in which ardent spirits can not be kept, given away or used.[17] It has been decided in a Virginia case that a store is a public place so long as it is kept open for the purpose of selling goods, but when the business of the day is ended, the store bona fide shut up and the doors closed, it ceases prima facie to be a public place in the absence of other proof.[18]

By a "place of common resort" the legislature undoubtedly meant a public place. A public place is any public road, street, or alley of a town or city, or any inn, tavern, store, grocery, or workshop, or place at which people are assembled, or to which people commonly resort, for purposes of business, amusement, recreation, or other purpose.[19] A public place does not

16. See Bates' Ann. St. Ohio 1904, § 4364—1.

17. § 53.

18. Windsor *v.* Commonwealth, 4 Leigh (Va.) 680.

19. Pen. Code Tex. 1895, art. 335. 6 Words and Phrases, 5807. See Windsor *v.* Com., 4 Leigh 680; Corn *v.* Teazle, 8 Gratt. 585.

mean a place devoted solely to the uses of the public, but it means a place which is in point of fact public, as distinguished from private—a place that is visited by many persons, and usually accessible to the neighboring public.[20] The assemblage of persons by invitation at a private house, to which the general public has not the right to go, for business or social purposes, does not constitute such house a place of common resort. The assemblage by invitation does not destroy the character or privacy of the house.[21] It has been held that a "public place" cannot be construed to include the private house of a gentleman at which he gives or holds a social party. A public place is one to which all persons have a right to go.[22] A private house may become a public place when frequented by many persons under suspicious circumstances.[23]

The most important exception to the general statement of what is a "home," is the room of a guest in a boarding house. The distinction between a guest in a hotel and a boarder in a boarding house is based commonly on the fact that a boarder contracts to pay for a specific time at a specific price while a guest at a hotel is bound for no stipulated time, but at his pleasure and pays the customary charge. This distinction is of no importance, for the guest and boarder are put upon the same footing. A boarder is generally defined as one who is provided food and lodging in the home of another for a stipulated price. In common acceptation a significant feature of boarding is procuring food. Lodging is lost sight of, and one may be a boarder and have his place of lodging elsewhere. Such person is ordinarily designated a "table boarder." [24] This is, however, not the meaning of the act, for it speaks of the "room of a guest" in a boarding house. A boarder with lodging elsewhere has no

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20. Gomprecht *v.* State, 37 S. W. 734, 735, 36 Tex. Cr. R. 434; Parker *v.* State, 26 Tex. 204, 207. 6 Words and Phrases, 5806.

The term "public," as applied to place, is not an absolute, but a relative term, and is used in contradiction to the term "private." State *v.* Sowers, 52 Ind. 311, 312.

21. See Coleman *v.* State, 20 Ala. 51; Roberts *v.* State (Ga. App.), 60 S E. 1082.

22. State *v.* Sowers, 52 Ind. 311.

23. State *v.* Pratt, 34 Vt. 323.

24. See Heron *v.* Webber (Me.), 68 Atl. 744.

room. It seems perfectly clear that the act refers to the room of a boarder who is provided both food and lodging in the boarding house, but that it does not refer to a boarder who lodges elsewhere and who has no room in the boarding house. It remains to be determined whether the act refers to a lodger in the house of another, but who procures food elsewhere. Such person is ordinarily termed a lodger and his room a lodging room. Such is both the ordinary and legal meaning and there are a number of cases so deciding. "Boarding" is, in every known instance, in the statutes and decisions of the courts, used in connection with furnishing food and never as lodging. This construction is strengthened by the fact that "boarding house" is, in the act, used in connection with hotel, which shows the legislature saw a similarity between the two, and which tends to show that a boarding house is a quasi public place. It has been held that a boarding house is not every private house where one or more boarders are kept occasionally and on special considerations; it is a quasi public house where boarders are generally and habitually kept, and which is held out and known as a place of entertainment of that kind. A lodger in the house of another who does not procure meals there is not a boarder.[25]

A hotel is a place where the proprietor furnishes food or lodging, or both, to travelers.[26] A hotel differs from a boarding house in that the proprietor may furnish lodging only and not board. Such a hotel is one on the European plan.[27] If an inhabitant of a place makes a special contract with the proprietor to board him at a hotel, he is a boarder and not a guest, and the hotel is his boarding house.[28]

In addition to the places enumerated, no place, as stated above,

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25. Cady *v.* McDowell, 1 Lans. (N. Y.), 482. See Brown *v.* Bell Co., 146 Iowa 89, 123 N. W. 251, 27 L. R. A. (N. S.), 407, Ann. Cas. 1912b, 852.

A place where lodging is furnished without meals is held not to be a boarding house in Metzler *v.* Terminal Hotel Co., 115 S. W. 1037, 135 Mo. App. 410.

26. Bunn *v.* Johnson, 77 Mo. App. 596, 599.

27. Vonderbank *v.* Schmidt, 10 South. 616, 617, 44 La. Ann. 264; 15 L. R. A. 462, 464, 32 Am. St. Rep. 336.

28. Norcross *v.* Norcross, 53 Me. 163, 169.

is a home which is not the permanent residence of the person and his family, and no place is a home which is used as or is permitted to become a meeting place or place of common resort.

T. B. B.

The Act Relating to Trading Stamps and Coupons.

Is the act of Virginia to prohibit the use of trading stamps and coupons enforceable under the recent decisions of the United States Supreme Court? The act of the general assembly of Virginia of 1897-98 provides: "(1) No person shall sell or offer for sale any article or merchandise of any description whatever with the promise, express or implied, to give or deliver or in any manner hold out the promise of gift or delivery of any ticket, check, metal or paper stamp, or other written or printed promise or assurance, express or implied, that the said ticket, check, metal or paper stamp, or written or printed promise or assurance, may be used in payment or purchase of or exchange for any other articles of merchandise from any other person or corporation. (2) It shall not be unlawful for any merchant or manufacturer to place tickets or coupons in packages of goods sold or manufactured by him, such tickets or coupons to be redeemed by such merchant or manufacturer either in money or in merchandise, whether such packages are sold directly to the customer or through retail merchants; nor shall it be unlawful for any person to give out with such package, tickets or coupons so given out by such merchant or manufacturer. (3) Any person violating the provisions of this act shall be guilty of a misdemeanor, and shall be punished by a fine of not more than one thousand dollars, or be imprisoned in jail, not exceeding six months, or both, in the discretion of the justice or jury trying the offense." Acts General Assembly 1897-'98, pp. 442, 443, c. 406.

In Young *v.* Commonwealth, 101 Va. 853, 45 S. E. 327, decided Sept. 17, 1903, the Supreme Court of Appeals of Virginia held the act to be in violation of the Constitution of the United States and not within the police power of the state. The decision followed cases from a number of other states, especially that of State *v.* Dalton (R. I.) 46 Atl. 234, 48 L. R. A. 775, 84

Am. St. Rep. 818. The opinion in the case reads: "Indulging every possible presumption in favor of the validity of the statute now under consideration, we are constrained to the conclusion, upon reason and authority, that it is not a valid exercise of legislative power. It attempts to prohibit and restrain the defendant in the lawful prosecution of a lawful business. 'To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of a purpose not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupation.' Lawton *v.* Steele, 152 U. S. 133, 137, 14 Sup. Ct. 499, 501, 38 L. Ed. 385."

The Supreme Court of the United States, in the cases of Rast *v.* Van Deman & Lewis Co., 36 Sup. Ct. Rep. 370; Tanner *v.* Little, 36 Sup. Ct. Rep. 379; Pitney *v.* Washington, 36 Sup. Ct. Rep. 385, decided March 6, 1916, held that substantially similar statutes of the states of Florida and Washington are constitutional. The Supreme Court holds (1) that such statutes do not amount to regulation of interstate commerce, as they are not designed for or executed through a sale of the original package of importation, but in the packages of retail and sale to the individual purchaser and consumer; (2) that they are not a denial of due process of law as infringing upon the liberty to contract; (3) that they are not unconstitutional as discriminatory and in violation of the equal protection of law clause; and (4) that they do not amount to an impairment of the obligation of contracts.

The opinions of the Supreme Court in these cases are interesting and important as to the extent of the police power of the state and also as to the power of the Legislature to determine the reasonableness and necessity for the exercise of such power. The opinions are greatly influenced by the fact that the states of Florida and Washington and nineteen other states have attempted to prohibit or license the selling or use of trading stamps or coupons. The court is of opinion that because there have been so many legislative attempts to regulate the

subject that a regulation thereof is necessary to the protection of the citizens of the different states. But it is not our present intention to discuss the police power of the states.

The Judiciary Code of Dec. 23, 1914, § 237, U. S. Comp. St. § 1214, provides for an appeal or writ of error to the Supreme Court of the United States where the decision of the highest court of a state is against the validity of a statute of the state claimed to be repugnant to the Constitution of the United States. Formerly an appeal or writ of error would lie only where the decision of the state court was in favor of the constitutionality of the statute under the United States Constitution. Therefore, at the time of the decision of the case of Young *v.* Commonwealth, an appeal or writ of error did not lie to the Supreme Court of the United States. The decision of the state court was final. Had the decision been rendered since the enactment of the Judiciary Code the decision of the Supreme Court of Appeals of Virginia could have been reviewed by the Supreme Court of the United States.

The decision of the United States Supreme Court is in fact if not in form a reversal of the Supreme Court of Appeals of Virginia, unless the cases can be distinguished on the ground of the one making the use of the stamps and coupons a crime and the other providing a prohibitory license. Such distinction is unreasonable and the opinions of the Supreme Court of the United States clearly indicate that the subject of trading stamps and coupons is a police regulation and is not protected by the Constitution of the United States.

While the decision of the Supreme Court of Appeals of Virginia is to be considered reversed as to the cases arising under the Constitution of the United States, it also refers to the Constitution of Virginia. The decision is, however, not in any sense based upon the Constitution of Virginia but makes a mere incidental mention of the Bill of Rights, which after being stated is not again referred to. The decision is under the Constitution of the United States and not under the Bill of Rights. It does not purport to declare the act in violation of the state constitution.

The act is omitted from the Code of 1904, but this does not amount to a repeal, nor can we find where it has been expressly

repealed. The Codifiers and the Legislature evidently considered it void and unworthy of further attention.

If the act has never been repealed and the Supreme Court of Appeals did not decide that it is unconstitutional as in violation of the Bill of Rights, both of which seem to be true, the act is still the law of the state despite the fact of its long considered unconstitutionality. There is little reason to doubt that if a person were indicted under the act that a lower court of the state would follow the decision of the Supreme Court of the United States and its decision would be permitted to stand by our Supreme Court of Appeals.

T. B. B.